IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGEMENT NO. 613 OF 2003

IN

SUMMARY SUIT NO. 3378 OF 2002

Bank of Baroda .. Plaintiffs

versus

Shaan Packaging Industries Ltd.& ors.. Defendants

...

Ms.Purnima Pandit i/b A.B.Shinde for the plaintiff.

Mr.C.D. Patel i/b Sarkar & Sarkar for the defendant no.1 to 5.

Mr.C.S. Kapadia i/b Lilani Shah for the defendant no.7.

CORAM : D.G. KARNIK,J.

DATED : 30th March 2005.

P.C.:

1. Heard the learned counsel for the plaintiff, defendant nos.1 to 5 and Shri Kapadia, learned counsel for the defendant no.7. The learned counsel for the defendant nos.1 to 5 reports no instructions.

None present for the defendant no.6.

2. This Summons for Judgement is taken out by the plaintiff bank in a suit filed for recovery of money advanced to the defendant no.1. The defendant no.1 is the partnership firm. The defendant nos.2 to 5 are its partners. At the request of the defendants, the plaintiff Bank granted two facilities by way of cash credit to the defendants. In consideration of the plaintiff bank granting of said cash facility, the defendant no.1 and its partners executed two promissory notes and also other security documents listed to the plaint, copies of which are annexed to the plaint. The defendant nos.6 and 7 agreed to stand as guarantors and executed a deed of guarantee on 2nd June 1995. Copy of the deed of guarantee is also annexed to the plaint. Enjoying the cash credit facility, the defendant nos.1 to 5 from time to time borrowed money from the plaintiff Bank. On demand, they failed and neglected to make the payment. Hence, plaintiff has filed this suit for recovery of the money due; under the said two advances. The defendant nos.1 to 5 have acknowledged in writing the balance amount due, copies of the acknowledgements dated 25th August 1999 are also annexed to the plaint

as Exhibit-D and D1.

3. The only contesting defendant i.e. defendant no.7 has not denied execution of the deed of guarantee nor has he denied the execution of the written acknowledgements. Learned counsel for the defendant no.7 however submits that the defendant is discharged as the plaintiff has given up the securities viz. stock and book debts by not realising them. no.4 of the deed of guarantee, the defendant nos.6 and 7 have given up all the rights conferred upon them u/s.133, 134, 135, 139 and 14 of the Contract Act. In the circumstances, the defence that the defendant no.7 is discharged on account of non realisation of the security is not available to the defendant no.7.

4. The defendant no.7 next contends that the plaintiff in the plaint has not made the statement that the plaintiff has given up the securities and therefore, the suit is not maintainable as a summary suit. Perusal of the prayer clause in the plaint shows that the plaintiff has claimed only the money decree and has not claimed realisation of any of the secured assets. Under Order 2 Rule 2 of the Code of

Civil Procedure the plaintiff is not entitled to file any separate suit for realisation of securities. Plaintiff not having claimed any relief regarding the securities in thhis suit is deemed to have given up the securities. Hence, this defence also does not give rise to any triable issue.

5. In the circumstances, there is no defence of substance available to either of the defendants. Summons for Judgement is accordingly made absolute and the suit of the plaintiff is decreed as follows:-

The defendant shall pay to the plaintiff a sum of Rs.4,23,486.77 together with interest on the principal sum of Rs.4 lakhs at 9% p.a. from the date of the suit till payment and all costs of the suit."

D.G. KARNIK, J